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United States Senate

COMMITTEE ON
HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS
WASHINGTON, DC 20510-6250

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June 20, 2014

The Honorable John A. Koskinen
Commissioner
Internal Revenue Service
111 Constitution Avenue, NW
Washington, DC 20224

Dear Mr. Koskinen:

I am writing regarding the letter of June 13, 2014, from Leonard Oursler, Director of Legislative Affairs for the Internal Revenue Service (IRS), to the Chairman and Ranking Member of the Senate Finance Committee regarding IRS document productions to Congress.¹ An Enclosure included with that letter—Enclosure 3—seems designed to give the impression that emails sent to or from former IRS employee Lois Lerner between 2009 and 2011 are unrecoverable because Ms. Lerner's official computer crashed some time during 2011.² Enclosure 3 further gives the impression that the IRS only recently learned that these emails were missing. Notably, the missing and allegedly unrecoverable emails are among those you promised, in March 2014, would be produced to Congress.³ As the Ranking Member of the Senate Subcommittee on the Effectiveness and Efficiency of Federal Programs and the Federal Workforce, which has oversight jurisdiction for the federal government's information technology systems, and a member of the Senate Finance Committee, Enclosure 3 gives me serious concerns about the adequacy of the IRS's information technology infrastructure and document management expertise.

First, Enclosure 3 creates that misleading impression that emails sent to or from Ms. Lerner between 2009 and 2011 are unrecoverable. For example, although Enclosure 3 lists four steps the IRS took to "produce as much email on which Ms. Lerner was an author or recipient as possible," it does not detail any steps the IRS plans to take to try and recover Ms. Lerner's missing emails.⁴ Further, Enclosure 3 is noticeably silent about whether Ms. Lerner's missing emails are actually unrecoverable. That is probably because they are not.

There are at least two sources from which email forensic experts could likely recover at least some of them. One source is the White House. My understanding is that all emails sent to or from the Executive Office of the President are archived using a system known as EmailXtender, which "[a]utomatically captures messages . . . including messages sent or

¹ Letter from Leonard Oursler, IRS, to Sens. Ron Wyden & Orrin Hatch, S. Comm. on Finance (June 13, 2014).
² *Id.* encl. 3.

³ *Examining the IRS Response to the Targeting Scandal*, Hr'g before the H. Comm. on Oversight & Gov't Reform, 113th Cong., Mar. 26, 2014 (testimony of John A. Koskinen, Comm'r, IRS).

⁴ Letter from Leonard Oursler, *supra* n.1, encl. 3, at 7.

received via Blackberries, in near real time.”⁵ The other source is transaction logs created by Mail Transfer Agents (MTAs) used by the IRS and other federal agencies. It is my understanding that email forensic experts can use these transaction logs to locate an individual’s emails, even if they have been deleted from the individual’s computer and from the email backup system used by the agency hosting the individual’s email account.

Second, Enclosure 3 implies that the IRS learned of Ms. Lerner’s missing emails as a result of its March 2014 commitment to produce all of Ms. Lerner’s email “regardless of relevance.”⁶ According to Enclosure 3, that commitment required the IRS “to load additional email beyond the email responsive to search terms originally loaded for review from Ms. Lerner’s custodial email box” and had to “reproces[s] what had been [originally] collected from Ms. Lerner.”⁷ It was during this process that the “IRS determined that her custodial email . . . contains very few emails prior to April 2011, while the number of Ms. Lerner’s custodial emails dated after April 2011 is more voluminous.”⁸

The IRS’s statement that it had to “reprocess” Ms. Lerner’s email to fulfill its March 2014 commitment is perplexing. As of March 2014, the IRS had already produced thousands of Ms. Lerner’s emails to Congress.⁹ By its own admission, to make those productions, the IRS had to have already collected and processed all of Ms. Lerner’s emails so that they could be “searched and analyzed for content potentially responsive to a particular request for information.”¹⁰ Enclosure 3 does not explain why the IRS would have to reprocess these emails to satisfy its March 2014 commitment.

Moreover, having already collected and processed Ms. Lerner’s complete email account as of 2013, it is incredible that the IRS could have failed to notice a gap of nearly two years in her email record until 2014.¹¹ At a minimum, the failure to notice such a gap calls into serious doubt the quality of the IRS’s previous productions to Congress. Standard quality control measures would seem to call for an analysis of an email account’s metadata after collection and processing to safeguard against data loss during those phases of a document production. Such a review would have surely alerted IRS officials to the enormous gap that exists in Ms. Lerner’s emails.

In light of the foregoing, I respectfully request answers to the following questions:

1. Will the IRS attempt to recover Ms. Lerner’s missing emails, including by working with the White House to access its EmailXtender archive and by coordinating with other relevant government agencies to reconstruct her email record using MTA transaction logs? If not, why not?

⁵ Letter from Brook Colangelo, Exec. Office of the President, to Meredith Fuchs, Nat’l Sec. Archive, & Anne Weismann, Citizens for Responsibility and Ethics in Washington, at 1 (Jan. 15, 2010).

⁶ Letter from Leonard Oursler, *supra* n.1, at 6.

⁷ *Id.* at 5-6.

⁸ *Id.* at 6.

⁹ *Id.*

¹⁰ *Id.* at 3-4.

¹¹ *See id.* at 6.

2. Enclosure 3 states that to comply with the IRS's March 2014 commitment, the IRS had to ensure that email "produced was no longer limited by search terms or subject matter." Why did that require "reprocessing what had been collected from Ms. Lerner"? Why could the IRS not fulfill its 2014 commitment by producing the balance of Ms. Lerner's already processed emails?
3. What quality control measures does the IRS use to ensure that data is not lost during the collection and processing phases of a document production? Were those procedures used with respect to the collection and processing of Ms. Lerner's emails? If not, why not?

I would appreciate a response to this letter by no later than June 26, 2014.

Sincerely,



Rob Portman
Ranking Member,
Senate Subcommittee on the Efficiency and
Effectiveness of Federal Programs and the Federal Workforce
Member, Senate Finance Committee